

Decision 13-07-048

July 25, 2013

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.

Application 12-04-019  
(Filed April 23, 2012)

**ORDER MODIFYING DECISION 12-10-030 AND  
DENYING REHEARING OF DECISION, AS MODIFIED**

**I. INTRODUCTION**

On November 20, 2012, the County of Monterey (“County”) and the Marina Coast Water District (“District”) filed timely applications for rehearing of the Decision (D.) 12-10-030 (“Decision”). The Decision resolves a threshold preemption issue in the application of California-American Water Company (“Cal-Am”) for approval of its Monterey Peninsula Water Supply Project (“MPWSP” or “Project”). (Application (A.) 12-04-019.) As part of the Project, Cal-Am seeks approval to construct a desalinization plant which would process between 5.4 and 9 millions of gallons of water per day. (A.12-04-019, at p. 1.)

In 1989, “Monterey County adopted an ordinance governing the issuance, suspension and revocation of permits for the construction and operation of desalination treatment facilities.” (Decision, at p. 3, Monterey Ordinance 3439 (“Desal Ordinance”).) In addition to general regulation of these facilities, the Ordinance specifically requires applicants seeking to construct desalinization plants to “[p]rovide assurances that each facility will be owned and operated by a public entity.” (Desal Ordinance § 10.72.030 (B).) In June, 2012, Monterey County (“County”) filed a declaratory relief action in the San Francisco Superior Court “seeking a judicial interpretation of whether the Ordinance

applied to the MPWSP.” (County App. Reh'g., at p. 2.) That Court action has since been dismissed. (See February 13, 2013 ALJ Ruling, at p. 8.)

The Decision resolves the issue of whether the Ordinance is preempted by the Commission, in advance of determining whether or not to approve Cal-Am's application. The Decision concludes:

[T]he authority of the Commission in regard to this application preempts Monterey County Code of Ordinance, Title 10, Chapter 10.72, concerning the construction, operation and ownership of desalination plants. This decision further determines that the findings, conclusions and orders herein are an exercise of jurisdiction that is paramount to that of a county Superior Court concerning the same subject.

(Decision, at p. 1.)

The County and the Marina Coast Water District (“District”) filed timely applications for rehearing of the Decision. The County argues: (1) the Decision commits error because it is an impermissible advisory opinion and the controversy is not ripe; (2) the Commission exceeded its authority by declaring the Ordinance unenforceable; and (3) the Commission's preemption of the entire Ordinance is overly broad. The District argues (1) the preemption issue is not ripe; (2) the Decision is an unmeritorious facial challenge; (3) the Decision erroneously bases its preemption conclusion on express, conflict, and field preemption; and (4) to the extent desalinization is a statewide concern, it is outside of the Commission's jurisdiction.

We have carefully considered all the arguments presented by rehearing applicants, and are of the opinion that modification of the Decision is warranted on the issue of the proper scope of the Commission's preemption order. With that modification, no legal error has been demonstrated. Accordingly, rehearing of the Decision, as modified, is denied.

## II. DISCUSSION

### A. Ripeness

Both the County and the District argue that the Decision errs in addressing whether the Desal Ordinance is preempted because the controversy is not ripe. According to both parties, the preemption issue is unripe because there is neither a concrete dispute nor an imminent risk of harm connected to the preemption determination. The County also argues that there are no extraordinary circumstances that would justify an advisory opinion. The District argues that the preemption finding prejudices the application for approval of the Project. The parties' ripeness arguments are misplaced.

The parties rely on general ripeness principles that provide that a controversy must be definite and concrete in order to be adjudicated, and that courts must evaluate both the fitness of the issues for review, and the hardship to the parties, if court consideration is withheld. (*Pacific Legal Foundation v. California Coastal Com.* (1992) 33 Cal. 3d 158, 171.) However, the County and the District cite cases and principles that apply to courts, as opposed to administrative agencies, such as the Commission. These cases are inapposite because we are unlike a court in many of the relevant respects.

Unlike a court, our functions are not solely adjudicatory. As the Supreme Court has stated:

There are two principal reasons why the commission is not a judicial tribunal in a strict sense. Technically, it is not constitutionally established as a judicial department. (Cal. Const., art. VI.) Moreover, it is not unusual for the commission to act as "informer, prosecutor, jury and judge in matters coming before it." (*People v. Western Air Lines, Inc.*, *supra*, 42 Cal. 2d at p. 631.) Thus, while a court may be described as a "passive" forum for adjusting disputes, the commission may assume a much more "active" role. (*Sale v. Railroad Commission*, *supra*, 15 Cal. 2d at p. 617.)

(*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal. 3d 891, 906.)

Accordingly, while a court's function is primarily dispute resolution (see *Pacific Legal Foundation*, at p. 170), our functions include legislation and permitting. For these reasons, advisory actions which are disfavored in courts may well be appropriate in Commission proceedings. Therefore, none of the cases cited by the County and the District, concerning restrictions on advisory actions in court proceedings, demonstrate any legal error in our issuance of such a decision. In fact, in the two primary ripeness cases cited in the applications for rehearing, *Pacific Legal Foundation* and *PG&E Corporation*, the agency in question had already ruled on issues that were found to be unripe for *judicial* review. (*Pacific Legal Foundation*, at p. 163 [Coastal Commission regulation issued, not yet applied]; *PG&E Corp. v. Public Utilities Comm.* (2004) 118 Cal.App.4<sup>th</sup> 1174 [First Priority Condition interpreted, though not yet applied].)

The County also cites Commission decisions where we have explained that it we are reluctant to issue advisory opinions and will only do so in extraordinary circumstances. (County App. Rehg., at pp. 7-8.) The District argues that we generally issue preemption determinations when a project is approved, as opposed to in an earlier phase. (District App. Rehg., at pp. 8-10.) Neither of these arguments demonstrate legal error in the Decision. Our decisions not to issue advisory opinions in other circumstances are in no way determinative of whether we can issue an opinion regarding preemption of the Desal Ordinance. The cited Commission decisions are easily distinguishable from the current controversy, and are simply exercises of our discretion.

Despite our general reluctance to issue advisory opinions, it is entirely within our discretion to determine whether or not to do so. As we stated in the Decision, the Commission “can determine the scope of its own authority, and can manage its own proceedings, and has broad authority to do so. [Citation].” (Decision, at p. 19.)

None of the cases the County cites indicates that we are in any way forbidden or restricted from issuing advisory opinions. Rather, they illustrate that the Commission is reluctant to “devote scarce Commission resources” to matters where there is no clear need for an opinion. (See *Re Turlock Irrigation District Service Area*

*Agreement* [D.00-06-002], at p. 7.)<sup>1</sup> Moreover, in *Re Northeast San Jose Transmission Reinforcement* [D.02-10-065], cited by the County, we actually ruled on Pacific Gas & Electric Company's argument, despite our finding that the claim was not ripe. (*Northeast San Jose*, at p. 3.)

Here, there are many good reasons that justify the issuance of the preemption opinion, whether or not that opinion is considered advisory. First, the scarce water supply situation in the Monterey basin is extreme and mandates the fullest degree of attention. Moreover, the use of desalination in California is in its infancy, and it would be unfortunate if uncertainty about regulatory jurisdiction created another obstacle to efforts to use desalination to increase water supply. Given the combined circumstances of an extreme water shortage, and a newly developing technology, the current situation easily qualifies as "extraordinary." It would serve no useful purpose for any entity to undertake lengthy and expensive planning processes at the Commission, only to be blocked at the end of the process by a local ordinance.

Aside from the general reasons to rule on preemption, it should also be noted that the instant opinion was not issued as a stand-alone opinion, or in a vacuum. It is an interlocutory decision – the initial decision in a proceeding designed to determine whether Cal-Am will be authorized to construct a desal facility and recover its costs. As we explained, "It is reasonable for the Commission to determine upfront, as a threshold issue, whether it has the legal authority to grant the approval sought by the utility." (Decision, at p. 19.) The District's arguments that we issued preemption determinations at the end of the proceeding in some other cases, does not indicate that it is error to organize this proceeding differently.

The District also maintains that the preemption finding somehow prejudices the application for authorization. (District App. Reh'g., at pp. 10-11.) There is no basis for these allegations, and contrary to the District's argument, we have made no findings

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<sup>1</sup> Unless otherwise noted, all citations to Commission decisions are to the PDF versions on the Commission's website at [www.cpuc.ca.gov](http://www.cpuc.ca.gov).

about the merits of the Project or whether it will be approved. As we stated, “Our determination that the Desal Ordinance is preempted means that this Commission could approve the proposed Cal-Am project, but does not in any way pre-judge whether the Commission will approve the proposed project.” (Decision, at p. 20.) The District’s argument is akin to suggesting that if a criminal Court announces it has jurisdiction over a matter, it has prejudged the guilt or innocence of the accused. This type of claim is devoid of merit.

Therefore, even though the preemption determination is issued in advance of the determination of whether to approve the project, and is advisory in that respect, it is part of a larger proceeding in which the preemption determination is essential. The fact that the preemption determination was made at the outset of the proceeding is simply a reflection of how we decided to organize our proceeding. Such a decision is soundly within our discretion.

For these reasons, whether or not it is considered “advisory,” there is no error in our issuance of a Decision ruling on preemption of the Desal Ordinance in advance of deciding whether or not the Project should be approved.

## **B. Scope and Authority for Preemption**

Both the County and District set forth a number of arguments challenging the scope of our preemption authority. Both parties suggest that the preemption holdings are overly broad. The District also argues that none of the relevant types of preemption apply. The County further maintains that we lack the authority to declare a local ordinance unenforceable. Although we have authority to preempt the Desal Ordinance to the extent it pertains to public utilities, we acknowledge that our holdings regarding the scope of our preemption were not sufficiently clear. We will clarify those holdings in today’s order.

The basic law in California concerning Commission preemption of local regulation has been stated in the California Constitution, as well as in case law. “A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission.” (Cal. Const., art. XII, § 8.) Even in areas of local

concern, “In any conflict between action by a municipality and a lawful order of the Commission the latter prevails.” (*Harbor Carriers v. City of Sausalito*, *supra*, 46 Cal.App.3d at p. 775; accord *Orange County Air Pollution Control Dist. v. Public Util.Com.* (1971) 4 Cal.3d 945, 950 [noting exception to longstanding rule where local jurisdiction is acting pursuant to state authority]; *California Water and Telephone Co. v. County of Los Angeles* (1967) 253 Cal. App. 2d 16, 31 [municipal water ordinance].)

The County argues that the Desal Ordinance should not be preempted in its entirety, as portions of it are not germane to public utilities. (County App. Rehg., at pp. 10-11.) The District contends that the preemption analysis “constitutes an unmeritorious facial challenge to the Desal Ordinance.” (District App. Rehg., at p. 33.) According to the District, the preemption analysis fails because there has been no determination by the Commission that there is no set of circumstances under which the Project can be implemented without violating the Desal Ordinance. (*Ibid.*)

The rehearing applicants’ point about the Commission’s preemption holdings being overly broad is well-taken. We note the Decision is not entirely clear the degree to which the Desal Ordinance is preempted. Our jurisdiction is solely over public utilities, and certain ancillary subject matters as granted by the Legislature. (See Cal. Const., art. XII.) Moreover, our only interest in the Desal Ordinance is to the extent it pertains to, or impacts, public utilities. As rehearing applicants note, portions of the Desal Ordinance are potentially applicable to non-utilities. (District App. Rehg., at p. 13; County App. Rehg., at pp. 10-11.) We have no jurisdiction or interest in local efforts to regulate non-utility matters that do not impact utility functions.

Therefore, we will modify the Decision to make it clear that we preempt the Desal Ordinance to the extent that Ordinance applies to, or impacts public utilities, as the Commission has no direct jurisdiction over local jurisdictions. We only hold that the Desal Ordinance cannot be applied to Cal-Am or any similarly situated water utility. Accordingly, because Cal-Am is a public utility, the Desal Ordinance has no application, or relevance to, any aspect of Cal-Am’s current application. With the clarification that

our preemption is only to the extent the Desal Ordinance is applied to utility operations, there is no legal error with the preemption conclusion.

We disagree with the District's contention that Commission preemption of the Desal Ordinance must await the approval of a project that is in conflict with the Ordinance's provisions. The clearest type of preemption here is express field preemption. The Commission already has jurisdiction over water utilities and their facilities (Pub. Util. Code, §§ 240, 241, 701, 761, 1001)<sup>2</sup> and regulates water utility plants through General Order ("GO") 103-A. As the Decision states, even absent a direct conflict, the Commission has indicated that there is no room for local regulation of water utility facilities. (See GO 103-A.) In that GO, the Commission specifically provided:

Local agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution, or other facilities (including the location of such facilities) constructed or installed by water or wastewater utilities subject to the Commission's jurisdiction.

(GO 103-A, § 1.9.)

The County argues that some local concerns are implicated by the Desal Ordinance, such as protecting freshwater aquifers. (County App. Reh'g., at p. 11.) However, to the extent we regulate water utilities, it is within our authority to find that its regulation does not allow further local regulation, even where there is no explicit conflict, or local interests are implicated.

*San Diego Gas & Elec. Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785 is directly on point. In that case, the Court found that Commission regulation of electric utility plants preempted Carlsbad floodplain ordinance which restricted the ability of San Diego Gas & Electric Company ("SDG&E") to conduct dredging necessary for its utility plant maintenance. Similar to the instant case, Carlsbad argued that it was regulating a local concern, in that case sandy beach access. (*Carlsbad*, at p. 801.) The Court rejected

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<sup>2</sup> All section references are to the Public Utilities Code unless otherwise stated.

Carlsbad's argument citing the impact on the statewide concern of utility operations. (*Ibid.*)

One significant difference here from *Carlsbad*, is that in that case the Commission had not spoken about preemption or the ordinance in question, and had no regulations pertinent to the floodplain ordinance. (*Carlsbad*, at p. 791.) Therefore, the Court analyzed the impact of the ordinance on the Commission's regulatory authority independently and found implied preemption. (*Id.* at pp. 794-804.) Here, there is no need to imply preemption because we have expressly held that we fully occupy the field of water utility facility regulation, in the Decision, as well as in GO 103-A.

The District argues that the Decision is in error because the relevant field is not water utilities, but rather desalination facility regulation. As the District acknowledges, there is little legal framework for the regulation of desalination. (District App. Rehg., at p.16.) Regardless of any overlap into this unformed field, the Commission's authority and interests are in utility regulation. In particular, with the clarification that preemption of the Desal Ordinance is only to the extent it is applied to utility matters, the District has no basis for its suggestion that the Commission's preemption is anything other than utility regulation. And since the District cannot point to any conflicting state regulation, its implication that the Commission is impermissibly interfering in the desalination field is without basis.

Similarly, the District's characterization of the Decision, as an "unmeritorious facial challenge to the Desal Ordinance" (District App. Rehg., at p. 13) is inaccurate. First, it is not a "challenge" at all, but rather an opinion about the preemptive impact of the Commission's authority. Second, the ordinance is not being struck down or invalidated, but rather is preempted to the extent it purports to apply to utility operations or facilities. Thus, not only is the preemption finding "as applied" to public utilities, it is also in an area, water utility facility regulation, that the Commission has determined is fully occupied. For these reasons *Cal. Coastal Com v. Granite Rock Co.* (1987) 480 U.S. 572, relied upon by the District, is inapposite. In *Granite Rock*, the Court found that the federal government did *not* intend to fully occupy the field of federal land

management. (*Id.* at p. 593.) Because we have established that we occupy the field of water utility facility regulation, there is no need to discuss other types of preemption, such as conflict preemption.

In addition, the County's contention that we lack the authority to declare an ordinance unenforceable is misplaced. In its argument, the County cites the restriction in the California Constitution, article III, section 3.5 that provides that an administrative agency cannot declare a statute unenforceable or unconstitutional. The County suggests that there is no reason this restriction should not apply to local ordinances.

The main reason the constitutional restriction does not apply here is that, by its terms and plain language, it applies to statutes and not ordinances. Contrary to the County's suggestions, it is not because we believe an ordinance has less dignity than a statute. (County App. Reh'g., at p. 9.) Rather, all relevant principles of preemption in California distinguish between state statutes and local ordinances. Most significantly, the California Constitution provides, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations ***not in conflict with general laws.***" (Cal. Const., art. XI, § 7, emphasis added.) Furthermore, as noted above, "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission." (Cal. Const., art. XII, § 8.)

Case law has also emphasized the difference between state and local authority for preemption purposes. In fact, in *Orange County Air Pollution Control Dist.*, *supra*, 4 Cal.3d at p. 950, the California Supreme Court specifically noted that the only circumstance where conflicting Commission regulation did not preempt a local action was where the local entity is acting pursuant to statewide, or general, as opposed to local authority. (*Ibid.*)

### III. CONCLUSION

For the above reasons, we will modify the language in the Decision to clarify that the Desal Ordinance is only preempted to the extent it purports to apply to public utilities. With this modification, our preemption conclusions are legal, and adequately supported.

**THEREFORE, IT IS ORDERED that:**

1. The first sentence of D.12-10-030 on page 1 is modified to read:

This decision determines that the authority of the Commission in regard to this application and the regulation of public utility water facilities subject to Commission jurisdiction, preempts Monterey County Code of Ordinances, Title 10, Chapter 10.72 concerning the construction, operation and ownership desalination plants, to the extent that ordinance purports to apply to public utility facilities or operations.

2. The first sentence of the first full paragraph on page 9 of D.12-10-030 is modified to read:

Here we determine that Monterey County Ordinance Chapter 10.72 (Desal Ordinance) is in conflict with California law, and is preempted in its entirety, to the extent it purports to apply to public utility facilities or operations.

3. Conclusion of Law 1 of D.12-10-030 is modified to read:

The Commission should declare that its authority, exercised through GO 103-A in A.12-04-019, preempts the Monterey County Desalination Ordinance, Title 10, Chapter 10.72, which governs the issuance, suspension and revocation of permits for the construction and operation of desalination treatment facilities, to the extent the ordinance purports to apply to public utility facilities or operations.

4. Ordering Paragraph 1 of D.12-10-030 is modified to read:

The Commission's authority, exercised through General Order 103-A in Application 12-04-019, preempts the Monterey County Desalination Ordinance, Title 10, Chapter 10.72 to the extent the Ordinance purports to apply to public utility facilities or operations.

5. The District's motion for leave to reply to the response of Cal-Am Water Co. is denied.

6. As modified, rehearing of D.12-10-030 is hereby denied.

This order is effective today.

Dated July 25, 2013, at San Francisco, California.

MICHAEL R. PEEVEY

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

CARLA J. PETERMAN

Commissioners